Opinions Below

The decision of the court of appeals is reported at 382 F.3d 91 (2d Cir. 2004). The opinion of the district court is reported at 118 F. Supp. 2d 459 (D. Vt. 2000).

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit was filed on August 18, 2004. Plaintiffs' Petition for Rehearing en banc was denied on February 11, 2005, which is reported at 406 F.3d 159 (2d Cir. 2005). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The First and Fourteenth Amendments to the United States Constitution are printed in the *Petition for a Writ of Certiorari* at 1. 1997 Vt. Laws P.A. 64 (codified at 17 V.S.A. §§ 2801 et seq.) ("Act 64") is printed in the Appendix to the Petition ("P.A.") at 1a-20a.

Statement of the Case

Petitioners adopt the Statement of the Case in the Brief of Petitioners Neil Randall, et al.

Summary of the Argument

The First Amendment[1] protects the four "indispensable democratic freedoms," *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945), of which political expression is "at the core." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). The "major purpose of that amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Act 64, however, was enacted

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[1]"Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for the redress of grievances." U.S. Const. amend. I.

for the opposite purpose, to force a reduction in overall campaign spending. This purpose is accomplished through the lowest candidate contribution limits in the country, through mandatory candidate expenditure limits, and through treating independent expenditures as related expenditures of candidates subject to these limits. This effort is in flagrant disregard of the First Amendment and is unconstitutional.

Argument

I. Act 64's Entire Scheme Was Enacted with the Specific Intent to Unconstitutionally Force a Reduction in Overall Campaign Spending in Flagrant Disregard of the First Amendment.

A. Vermont enacted both "laughably low" contribution and expenditure limits with the specific intent to force a reduction in overall candidate campaign spending.

Act 64 contains such "laughably low" contribution, P.A. 331a (Walker, C.J., dissenting), and expenditure limits, P.A. at 343a-44a (Cabranes, J. dissenting), "that they cannot but impede meaningful debate of public issues." *Id.* Of course, this was the purpose, as well as the effect, of Act 64's provisions.

Act 64's candidate contribution and expenditure limits were specifically enacted for the impermissible purpose of reducing overall campaign spending. The original version of the bill did not include mandatory spending limits, but did include low contribution limits, Ex. I, E-0001-25, and was lauded by Gov. Howard Dean as a plan which "limits the amount of money candidates can spend in both primary and general elections." Ex. III, E-0903. Similarly, the bill's sponsor, Rep. Karen Kitzmiller, testified in the committee hearings, before the mandatory spending limits were inserted in the bill, that the bill had

two principal goals: (1) "to reduce and control expenditures on election campaigns" and (2) to provide public funding. Ex. VIII, E-2839, E-2894. The legislative counsel also described a principal goal of this bill as "to reduce and control the expenditures on election campaigns," through low contribution limits. Ex. VIII, E-2813. Once the bill had been amended to include mandatory spending limits, the legislative counsel reiterated that "[t]he bill as amended would control campaign expenditures by establishing mandatory campaign expenditure limits applicable to all candidates . . . . The bill would also limit campaign expenditures by limiting the amounts . . . of contributions made to candidates." Ex. VIII, E-2821.

The legislative findings emphasize that "[e]lection campaigns for statewide and state legislative office are becoming too expensive," Finding (1), P.A. 101a, that "expensively long and expensive campaigns" are undesirable, Finding (10), *Id.* at 103a, and that "campaign expenditures must be reduced for incumbents."[2] Finding (15), *Id.* at 104a. In contrast, the terms "corruption" or "improper influence" are conspicuously absent from the legislative findings enacted with Act 64. *Id.* at 101a-04a.

The desire to force a reduction in overall candidate campaign spending was motivated in part by nostalgia for a bygone era when campaigns in Vermont were perceived to be less sophisticated and were thought to

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[2]Act 64 replaced a $1,000 per election candidate contribution limit from individuals and PACs in effect since 1971. Political party contributions to candidates were unlimited. Furthermore, from 1993 to 1998, candidates could voluntarily agree to limit campaign expenditures to amounts that were in place pre-*Buckley*. Former 17 V.S.A. §§ 2841-2842. Participation in this voluntary program went from 85% to 90% in the first year to zero percent of statewide elections in 1998. P.A. 28a. Apparently, these limits did not stem campaign finance spending which the legislature wanted to accomplish with Act 64.

rely on personal contact, not mass media advertizing. Ex. III, E-902; Tr. V-147. With drastically reduced overall campaign spending enforced by Act 64, Vermont argued below that modern, more costly means of communicating with the electorate could be replaced by candidates personally delivering their campaign messages door-to-door (Def.'s Br. 44-46 (2d Cir.)). While some candidates prefer grass roots campaigning, Tr. V-127, 129, 138, 141-43, forego more expensive campaigns due to lack of resources, Tr. II-13, or find it adequate to get themselves elected in non-competitive races, many candidates find it necessary to utilize mass media communications. Tr. IV-163, 172; Ex. VIII, E-3052. Act 64's contribution and expenditure limits, however, attempt to impose one method of campaigning by severely limiting the resources needed for others.

B. Forcing a reduction in candidate campaign spending is an impermissible legislative purpose.

The forced reduction in overall candidate campaign spending is illegitimate under the First Amendment. As this Court stated in *Buckley*:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley v. Valeo, 424 U.S.1, 57 (1976). Thus, campaign expenditure limits were invalidated in *Buckley*, because they were enacted to combat "wasteful campaign spending." *FEC v. Colorado Republican Fed. Campaign*

Comm., 533 U.S. 431, 457 (2001) (*"Colorado II"*).

Furthermore, legislating for the impermissible purpose of the "suppression of ideas" is unconstitutional, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388 n.3 (2000) (*"Shrink"*); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 540 (1987), and was fatal to the limits at issue in *Colorado I*:

> This Court's opinions suggest that Congress wrote the . . . [p]rovision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending.

Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 618 (1996) (citations omitted) (*"Colorado I"*).

The evidence here demonstrates that the candidate contribution and expenditure limits were drafted for the purpose of reducing overall campaign expenditures, an interest which this Court has explicitly rejected.[3] It should not be surprising that the provisions would have that very effect.

C. Restrictions on candidate speech have a substantial negative effect on our democracy.

Candidate speech, the target of Act 64's contribution and expenditure limits is entitled to the highest protection under the First Amendment. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) (applying strict scrutiny to legislation limiting judicial

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[3] "[T]he proponents of Act 64 never doubted its unconstitutionality under *Buckley* and enacted it for the explicit purpose of creating a vehicle for litigation to overturn *Buckley*." P.A. 194a-95a (Winter, J., dissenting), 201a-02a, 258a-59a; P.A. 340a (Jacobs, J., dissenting); *see also* Ex. VIII, E-2821.

candidate speech). The public must be able to make "informed choices" regarding candidates because those individuals will "shape the course that we follow as a nation," *Buckley*, 424 U.S. at 14-15, and the public is best able to make such choices when they hear *from the candidates themselves* regarding their qualifications and positions on issues.

> [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that *they* be allowed freely to express *themselves* on matters of current public importance. [As a result,] [w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

White, 536 U.S. at 781-82 (citations and internal quotation marks omitted) (emphasis added); *see also id.* at 805-06 (Ginsburg, J., dissenting). So "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy" whether the source of the money spent is from his own funds or is raised through legal contributions. *Buckley*, 424 U.S. at 54. Candidates cannot be required to be bit players in their own elections.

D. This Court should not defer to incumbent legislators that pass laws, such as Act 64, affecting their own electoral fate.

The Second Circuit afforded substantial deference to the "predictive judgments" of the Vermont legislature regarding its "effect . . . on candidate behavior." P.A. 143a

n.17.[4] However, "[p]rotecting speech requires that courts be skeptical and assume the worst – not as a matter of fact, but as a matter of prudence and policy." P.A. 337a (Jacobs, J., dissenting). Strict scrutiny requires this "cold eye." *Id.* at 338a; *see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547-49 (2001).

This is especially true here where "the dominant but impermissible effect of the Act is to protect incumbents," P.A. 336a (Jacobs, J., dissenting),[5] where the "theory and factual assumptions proffered by the law's supporters [are accepted] at face value even when their actions belie their words," P.A. 207a (Winter, J., dissenting), when the law was expressly adopted for the illegitimate purpose of forcing a reduction in overall campaign spending, and when the State insists that their legislators are so corrupt that they will "sell privileged access," P.A. 101a, for "laughably low" contributions and "so crave reelection that they ignore official duties and personal honor to that end." P.A. 249a (Winter, J. dissenting), 206a.

II. Vermont's Contribution Limits Are Too Low To Be Closely Drawn to Further a Sufficiently Important Interest.

While contribution limits "impinge on the protected

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[4]The Second Circuit cited *McConnell v. FEC*, 540 U.S. 93, 165-66 (2003), for deferring to the predictive judgment of Congress that if state parties were not limited in their use of soft money in federal elections they would be used to circumvent the soft money ban on national parties. This prediction of circumvention has no relevance here. There are no options for candidate speech beyond that permitted by the funds raised under the contribution limits and allowed to be spent under the expenditure limits.

[5]Deference to legislative judgments should be afforded if "that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge." *Shrink*, 528 U.S. at 402 (Breyer, J., concurring).

freedoms of expression and association," *McConnell*, 540 U.S. at 231, they may be upheld if "there is a 'sufficiently important interest,'" and if the limits are "'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms." *Id.* (quoting *Buckley*, 424 U.S. at 25).

A. Vermont's contribution limits are not closely drawn because they are not limited to only large contributions that pose the danger of real or apparent corruption.

The corruption interest arises from "the perception of undue influence of *large* contributors to a candidate," *Shrink*, 528 U.S. at 393 (emphasis added), because of a "threat from politicians too compliant with the wishes of *large* contributors." *Id.* at 389 (emphasis added). Thus, this Court's corruption interest has two elements: (1) that the contribution be large enough to give rise to a legitimate suspicion of corruption, and (2) that there is a bona fide "suspicion that [the] large contributions are corrupt." *Id.* at 389-95.

1. Vermont's contribution limits are not limited to banning only large contributions that pose the danger of real or apparent corruption.

Buckley "reiterated this [large contribution] interest at least seven times," *Carver*, 72 F.3d 633, 638 (8th Cir. 1995) (citing *Buckley*, 424 U.S. at 25-28); *see also Buckley*, 424 U.S. at 45-46, 55, 67, and this Court upheld a $2,150 per election cycle limit in *Shrink* based on evidence of *large* contributions. 528 U.S. at 390-91.

The District Court attempted to meet this "large contribution" requirement by disengaging "large" from "the perception of undue influence." While the court characterized the contribution limits as approximating amounts "considered suspiciously large by the Vermont public," P.A. 59a, none of the seven witnesses the District

Court cited referred to them in this way. In fact, none of these witnesses testified that these contribution amounts would lead to public perception of corruption. The witnesses only referred to the relative size of the amounts, compared to most contributions, as "significant," "good-sized," and "large." A "significant" contribution is not the same as a "suspiciously large" contribution, or one that is large enough to give rise to a "perception of undue influence." Ex. VII, E-2641, 2673; Tr. VII-19; Tr. III-23-26.

2. Vermont has failed to prove that real or apparent corruption is closely related to its low contribution limits.

a. Vermont's conception of "corruption" goes well beyond this Court's.

The "hallmark of corruption" is a "financial *quid pro quo*: dollars for political favors," where "elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). However, there is no evidence of such corruption in this case, and the State's witnesses emphasized that they were "not talking about selling votes . . . . [but] about gaining access," Tr. VII-105-06, such as "through the fundraising system," P.A. 101a, or because "officials are more likely to return donors' phone calls." *Id.* at 140a. This evidence, however, was related to contributions of a thousand dollars or more, far above Act 64's new limits. Tr. VII-50 ($1,000); Tr. IX-167-69 ($1,000 to $2,000).[6] Indeed, the only finding by the Vermont

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[6]In fact, Plaintiffs' evidence demonstrated that, of those members of the public that thought that persons making large contribution were "trying to buy special favors," 53% picked $20,000 or more, 17% picked a contribution from $1,000 to $5,000, and only 2% said "any amount." Ex. VIII, E-2742.

legislature that even remotely related to "corruption" was that Vermont politicians would "give access to contributors who make large contributions in preference to those who make small or no contributions," Finding (2), P.A. 102a, and the court below believed that this was sufficient. *Id.* at 94a.

It is true that this Court has found that the interest in corruption "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *McConnell*, 540 U. S. at 150 (citation and internal quotation marks omitted). It was, however, "the manner in which parties *sold* access to federal candidates and officeholders," in *McConnell*, "that has given rise to the appearance of undue influence." *Id.* at 153. In *McConnell*, a systematic scheme of the national party committee "peddl[ed] access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 150. But here there is no evidence of pre-access demands for contributions conditioned on granting access, only evidence post-contribution of "officials . . . more likely to return donors' phone calls." P.A. 140a.

This minimal evidence was countered by considerable evidence that even gaining access to legislators by large campaign contributions is not reasonably perceived in Vermont politics. Several witnesses with extensive experience in Vermont government testified that they were not aware of any Vermont politician ever providing preferential access for campaign contributions. For example, Steve Howard testified that in his six years of service in the Vermont House of Representatives and as chairman of the State Democratic Committee he was never aware of any situations in which contributions have purchased access to Vermont legislators. Tr. IV-180.

Moreover, there is considerable evidence in this record

that politicians in Vermont are readily accessible to all constituents. "Legislators [in Vermont] are accessible [] even on the floor of the house as they are voting . . . . [A]ccess really isn't worth anything in Vermont because it's prevalent . . . . Citizens see their legislators on a daily basis so they wouldn't have to pay for that access." Tr. IV-180-81. Legislators in Vermont will typically see anyone that wants to see them. Tr. VII-28. The record shows that Vermont officials are readily and easily accessible to *all* constituents.

b. Given the implausibility that $200-$400 contributions pose a danger of corruption, convincing evidence of corruption is necessary.

Although contribution limits can be upheld based upon their value in preventing corruption, this justification is not automatic. Even though the interest is "important in the abstract," this does not necessarily mean that the contribution limits "will in fact advance those interests." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 (2000) (Souter, J., concurring in part and dissenting in part) ("[A]pplication of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue."). Thus, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391. "*Buckley* demonstrates that the dangers of *large*, corrupt contributions and the suspicion that *large* contributions are corrupt are neither novel nor implausible." *Id.* (emphasis added). The limit upheld in *Shrink*, however, was $2,150 per election cycle, which is much larger than Vermont's $200 to $400 per election cycle limits. A

stronger evidentiary showing of the government's interest is required here, because Vermont's limits are so low as to render the anti-corruption interest implausible.[7]

Furthermore, these new low contribution limits replaced Vermont's $2,000 per cycle contribution limit. There is no evidence that the prior limit was insufficient to accomplish its permissible purpose. This is fatal to the constitutionality of the new limits. *See, e.g. Carver*, 72 F.2d at 643 (striking down new low contribution limits due to a lack of "any evidence of a harm or disease that needed to be addressed" between the old and new limits).

3. There is insufficient evidence of corruption in this case.

In upholding the limits in *Shrink*, this Court relied upon evidence that contributions in Missouri actually appeared to corrupt politicians.[8] In contrast to the

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[7] For example, this Court has held that a zero contribution limit on minors was unconstitutional, because "[a]bsent a more convincing case of the claimed evil, this interest is simply too attenuated . . . to withstand heightened scrutiny." *McConnell*, 540 U.S. at 232.

[8] The record evidence in *Shrink*, and the related case of *Carver*, included serious reports of alleged corruption. One reported incident was the decision of the state treasurer to use a bank for state business after that bank contributed $20,000 to the treasurer's campaign. *Shrink*, 528 U.S. at 393. Another article reported a state auditor candidate's receipt of a $40,000 contribution from a brewery and a $20,000 contribution from a bank. *Id.* The Eighth Circuit in *Carver* cited a $420,000 contribution to Missouri candidates from a political action committee linked to an investment bank. *Id.* at 393-94. In addition, there were reports of three scandals, including one in which a state legislator was accused of sponsoring legislation in exchange for kickbacks and another report of Missouri's former attorney general pleading guilty to conspiracy charges for misusing state property after being indicted for using a workers' compensation fund to profit campaign contributors. *Id.* at 394. In spite of these seemingly serious problems in Missouri, this Court cautioned that "there might, of course, be need for a more extensive evidentiary

evidence in *Shrink*, what is most significant about the State's evidence here is that it is "largely sparse, anecdotal, and conclusory," P.A. 266a (Winter, J., dissenting), contains "gross hyperbole . . . with precisely the same scripted sound-bites that are used in every talk-show discussion of the issues," *Id.* at 268a, and presents an absurdly contradictory "portrait of Vermont politics." *Id.* at 266a-67a. Despite a ten-day trial and testimony from the chief drafters and promoters of this legislation, veteran legislators, and campaign managers, the State failed to uncover a single incident of real or apparent corruption. Defense witnesses conceded that they could not point to any such incident in their own extensive experience in politics. Peter Smith, a former Vermont officeholder, testified that he was not aware of any instance in Vermont in which there was trading of votes in exchange for contributions. Tr. VIII-79. Karen Kitzmiller, a state representative, complained that "two particular groups, the tobacco industry and the pharmaceutical industry . . . freely give contributions to people *who support their views*," but she could not say "whether votes are changed because of that." Tr. X-180 (emphasis added). *See also* Tr. V-115; Ex. IV, E-1362-64.

The District Court's decision was also based upon evidence of dubious relevance and little magnitude. Most of it pertained to a supposed erosion of public confidence. P.A. 56a. However, such a showing of a general distrust of political actors "is not sufficient" and is "irrelevant to the critical elements to be proved: corruption of candidates or public perception of corruption of candidates." *NCPAC*, 470 U.S. at 499; Tr. VIII-134-38. The State has failed to bring forth convincing evidence of real or

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documentation if petitioners had made *any* showing of their own to cast doubt on the apparent implications of . . . the record." *Id.* (emphasis added).

apparent corruption, especially in light of the extremely low level of the limits and in light of the considerable evidence weighing against the legitimacy of the interest.

III. Because Vermont's Contribution Limits Are So Low That They Prevent Candidates from Mounting Effective Campaigns, They Are Unconstitutional.

A. Contribution limits that have a severe impact on political dialogue by preventing candidates from amassing the resources necessary for effective advocacy are unconstitutional.

"Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to 'prevent[] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21); *Shrink*, 528 U.S. at 395-96 (same). Thus, "[p]lacing limits on contributions which in turn limit expenditures plainly impairs freedom of expression," *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981), which would make the limits a "difference[] in kind," not just a "[d]istinction[] in degree." *Buckley*, 424 U.S. at 30. Such a "system of suppressed political advocacy . . . would be unconstitutional under *Buckley*," *Shrink*, 528 U.S. at 396.[9]

B. Vermont's contribution limits have a severe impact on political dialogue by preventing candidates from amassing the resources necessary for effective advocacy.

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[9]For analogous situations, *compare Rosario v. Rockefeller*, 410 U.S. 752 (1973) *with Kusper v. Pontikes*, 414 U.S. 51 (1973); *also compare Hill v. Colorado*, 530 U.S. 703 (2000) *with Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997).

The Second Circuit failed to undertake a careful review of the consequences of the contribution limits and instead deferred to the flawed findings of the District Court, which found that the limits did not have a severe impact on political dialogue, primarily because: 1) over the three election cycles prior to trial, less than 10% of individual contributions exceeded the limits, and 2) the limits were high enough to permit effective campaigning in a mayoral election conducted under the limits. P.A. 170a. These findings do not justify contribution limits as extraordinarily low as Vermont's.

1. The evidence demonstrates that Vermont's contribution limits have a severe impact on political dialogue.

First, the District Court found that "[e]xpert testimony revealed that over the last three election cycles the percentage of all candidates' contributions received over the contribution limits was less than 10%." P.A. 57a. However, the District Court used the wrong analysis. Since this Court's concern is whether the limits could have a "severe impact on political dialogue," *Buckley*, 424 U.S. at 21, the focus must not be on how many individual contributions were over the limit, but rather the total amount of campaign *funds* that candidates would lose.

The evidence in *Shrink* failed to show any impact on the total amount of funds available to campaigns beyond the dubious and singular example of one candidate, who could identify only one contributor who would have given him more than the limit. This evidence failed, since "a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*." *Shrink*, 528 U.S. at 396.

In contrast to *Shrink*, the State's expert confirmed that Vermont campaigns would lose significant funds, over

28% in 1998 for all state senate campaigns and over 22% in all state house campaigns.[10] Ex. III, E-976-78. The impact on statewide candidates since 1994 showed several candidates losing more than 50% of their funding, with impacts of 30% or more being quite common. Ex. III, E-970-74.

Such statistics dwarf the 5.1% of funds affected by the contribution limits in *Buckley*, which provided the basis for the Court's finding that "[t]here is no indication . . . that the contribution limitations . . . would have any dramatic[ally] adverse effect on the funding of campaigns and political associations." 424 U.S. at 21.

The State's expert analyzed the effect on all campaigns when the focus should be on competitive elections. P.A. 236a-40a (Winter, J., dissenting); Tr. II-73, IV-17, VIII-150-51, X-154. There are many races where campaigns are irrelevant to the outcome, such as where candidates run unopposed, against only token opposition, or in a district that overwhelmingly favors one party. Tr. III-37. Further, minor party candidates rarely run to win but only to show the flag. Tr. II-22, 39. Because of these factors, over 1/3 of victorious house candidates in 1998 spent less than $500.00 in their campaigns, Ex. III, E-0945, and many more won with little candidate spending.

A better model for evaluating the effect of campaign finance limits is to examine the fraction of races that are truly competitive. Tr. II-73. In competitive races, an effective campaign can contribute to the outcome, and often determine which party controls legislative assemblies. Tr. VIII-139-40; Ex. VIII, E-2748. Thus, candidates

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[10]These percentages are actually significant understatements of funds lost due to the expert's assumption that all non-filing candidates each raised $500, and that none of those candidates received contributions over the applicable $200 or $300 limit. Ex. III, E-946-47. Neither assumption is correct.

are motivated to reach as many voters as possible through a variety of methods, including door-to-door distribution of literature, campaign events, direct mail, and advertising in newspapers, on radio and television, and through bill boards and yard signs. Ex. VIII, E-2760, E-2766, E-2772-77. E-2789, E-3052, E-3056-60. Since competitive races are where effective campaigns are most often conducted and can have an impact, the relevant measure of contribution limits is their effect on competitive races. Tr. X-154, IV-17.

The Plaintiffs' expert found that 20% of both senate and house campaigns in 1998 would have experienced a loss of over 30% of their contribution funds. Ex. VII, E-2351. Furthermore, in analyzing the most competitive elections, those targeted by the Vermont Republican Party, the Plaintiff's expert found that in 15 of the 17 1998 house races, the Republican candidates would have lost between $550 and $3,761 in raw dollars and between 8.7% and 54.8% in total funds as a result of the contribution limit. Ex. VII, E-2360-75. Similarly, the 14 targeted senate candidates would have lost from $3,150 to $6,900 in raw dollars and 13% to 43.7% of their total funds. Ex. VII, E-2354-59. When the "single source" rule is applied to Republican Party contributions, the candidates would have lost more funds. Ex. VII, E-2602. These candidates would have been forced to forego substantial communications as a result. Tr. II-81-95.

2. The evidence establishes that the contribution limits prevent candidates from amassing the resources necessary for effective campaigns.

Second, the District Court found that because the Burlington mayoral election, conducted after imposition of the contribution limits, "involved effective campaigns despite the contribution limitations," and because "the mayoral candidates raised funds comparable to the

amounts spent in state senate races in the past," P.A. 171a, the limits were high enough to permit effective campaigning.

The evidence demonstrates, however, that the $200 contribution limit in the mayoral race prevented challenger Kurt Wright from mounting an effective campaign. He "worked very hard" and "did well to raise" the $19,158 that he ultimately received, Ex. VIII, E-3053-54 (Wright deposition), Ex. VIII, E-2789, but this was $8,000-$10,000 less than it would have been. Ex. VIII, E-3052-54. This loss of funds forced the cancellation of a crucial direct mail effort and reduced his communication by other methods such as radio, television, and through volunteers coordinated by paid staff. Ex. VIII, E-3052.

The District Court also relied on a superficial description of the overall spending in the mayor's race compared with that of Chittenden County Senate races. The District Court compared the two competitive mayoral candidates with the *average* spending in six senate races, which included many candidates whose election was either a foregone conclusion or an impossibility. P.A. 58a-59a. In fact, in the 1996 and 1998 Chittenden Senate races, there were five challengers – including Wright himself – who spent more than Wright did in his mayoral race. Ex. IV, E-1305-06. In summary, the District Court's findings not withstanding, the evidence demonstrates that the contribution limits have a severe impact on political dialogue.

To determine whether the limits prevented candidates from mounting effective campaigns, the Second Circuit erroneously looked to whether the limits are "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." P.A. 153a, 157a. This language, borrowed from *Shrink*, 528 U.S. at 397, is not the constitutional standard; instead, the standard looks to a candi-

date's "power to mount a campaign with all the dollars likely to be forthcoming." *Id.* When low contribution limits act as expenditure limits, candidates still must have sufficient funds to mount effective campaigns. Read otherwise, this would represent a complete abandonment of the First Amendment mandate that citizens "retain control over the quantity and range of debate on public issues in a political campaign," and that the government may not limit certain spending because it deems it "wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57.

The amount of money needed to mount an effective campaign[11] varies widely.[12] Some candidates are well known; others have a substantial advantage due to their party affiliation. Some districts comprise a single town with a single media market while others have several towns or large rural areas with multiple media markets. Still others are located in metropolitan areas where media ads are especially expensive because they cover more than the district. Tr. II-74-95.

Another key factor is the well established principle of diminishing marginal returns. After an initial surge of

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[11]Generally, a candidate is able to mount an effective campaign when she is able to effectively communicate to at least 75-80% of potential voters the candidate's name, something about the candidate as a person, the candidate's positions on key issues, and some contrast of the candidate's positions with her opponent's. Tr. I-95-97; Tr. IV-80; Tr. II-71. This requires communicating a minimum of 4 to 5 messages at least 4 to 5 times to each potential voter, Tr. I-98-100; Tr. II-72. The candidate must also have sufficient funds to respond to an opponent. Tr. II-126. Many candidates do not run effective campaigns. Tr. I-95-96.

[12]For an unknown challenger to run an effective campaign, it would cost $4,000 to $6,000 in the house and $30,000 to $50,000 in the senate, Tr. IV-169, 171; an effective statewide gubernatorial race costs between $600,000 and $800,000. Tr. IV-81; Tr. I-39-40; Tr. IV-27-28.

very effective spending, each successive communication dollar is likely to reach and motivate fewer voters. Conversely, each successive voter will cost more to reach than the one before. Tr. III-163-64. Reaching such additional voters is critical in the most competitive races. For this reason, mounting an effective campaign in a competitive race costs far more than less competitive ones.[13]

The record is replete with evidence that the contribution limits are too low to permit effective campaigning. George McNeill, a political consultant for hundreds of Vermont races, testified that many 1998 Vermont state senate and house candidates would not have been able to run effective campaigns under the limits. Tr. II-73-101. Ninety percent of house races targeted by the Republican Party in 1998 and seventy-nine percent of targeted 1998 senate races would have been unable to run effective campaigns. Tr. II-74-92, 99-102.[14] The money lost could

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[13]In addition, because of the low contribution limits, candidates will face increased competition from independent expenditures, which could drown out or at least dilute the candidate's own message. In fact, the "tight contribution limits" have caused an "unprecedented amount" of independent expenditures in the 2000 election. P.A. 241a (Winter, J. dissenting).

[14]For instance, Gerald Morrissey would have lost one-quarter of his contributions revenue under the contribution limits, and could not have effectively campaigned for state senate against an "entrenched senator." Tr. II-76. Neither could Dennis Delaney, because Chittenden County is Vermont's largest county with much higher expenses. Tr. II-80-81. Ruth Harvie could not have effectively campaigned because advertising for mass media in her state senate district is expensive since there are a lot of "small, individual newspapers." Tr. II-84-85. Joseph Tully, a "relative newcomer," would have been unable to "get the name recognition and the issue recognition that he was able to get" before the limits. Tr. II-87-88. Patricia Welch, who had "been out of the political scene for five to six years," would not have acquired the necessary name recognition. Tr. II-89. Harvey Smith could not have effectively campaigned, because, in his

not have been regained by additional fundraising. Tr. II-74-92, 99-102.[15]

William Meub, who had run for governor, testified that the contribution limit would have prohibited him from amassing the resources he needed to mount an effective campaign and would have drained his time, making it even more difficult to campaign. "What you have done [by imposing the $400 limit] is you have required an increased amount of time at fundraising, at much lower levels, so that the candidate really can't be effectively out there campaigning . . . ." Tr. IV-36.

The extensive record in this case firmly establishes that Vermont's exceedingly low contribution limits create a "system of suppressed political advocacy," just as the legislature intended. Because candidates cannot mount effective campaigns under the limits, Vermont's contribution limits are unconstitutional.

IV. Vermont's Contribution Limits Are Unconstitutionally Low Because They Insulate Legislators from Challenge.

Contribution limits can be so low that they "significantly increase[] the . . . advantages of incumbency and thereby insulate[] legislators from effective electoral

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district, he would have to advertise in more than one newspaper and on two or three radio stations. Tr. II-91. If $2000 had been removed from David Brown's campaign funds, he would have had to reduce advertising, "whether in the newspapers, TV or lawn signs . . . [or] walking banners," and "you couldn't have run an effective campaign against someone of [the incumbent's] stature with this kind of money." Tr. II-92.

[15]Act 64's contribution limits also have a chilling effect on individuals deciding whether to run for office. McNeill testified that prospective candidates, after having Act 64 explained to them, told him, "I have decided not to do this. This is too complicated. I don't think I can raise the money to do this." Tr. II-65.

challenge." *Shrink*, 528 U.S. at 404 (Breyer, J., concurring). This concern acknowledges that challengers face the harshest impact of contribution limits.

"[A]n incumbent usually begins the race with significant advantages." *Buckley*, 424 U.S. at 31 n.33. Most incumbents begin their campaigns with strong name recognition and widespread public knowledge of their qualifications and positions. Ex. IV, E-1395-99. Challengers spend more to get their message out, Tr. IV-172-73; Ex. VII, E-2703-05, because they are usually relative unknowns. Tr. II-184. Challengers also suffer because they generally have less developed contributor lists and contact networks than incumbents, so they tend to have more difficulty raising funds than incumbents, Ex. VIII, E-3076; Tr. I-94-95, and must rely upon a smaller group of larger contributors, especially for the "seed money" they need to get their campaigns started. Tr. IV-40.

Justice Breyer emphasized, in *Shrink*, that, "[t]he statutory limit here, $1,075 [per election], is low enough to raise such a question." *Shrink*, 528 U.S. at 404 (Breyer, J. concurring). Thus, Missouri's contribution limits, even though upheld, were constitutionally suspect, even though they allowed per-cycle contributions of more than five times that allowed by Vermont's highest limit.[16] If limiting Missouri candidates to $2,150 per election cycle raises disturbing questions, Vermont's limits of $200-$400 per cycle must be considered unconstitutional.

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[16]Act 64's choice of a two-year cycle combines primary and general elections under the limits and "does not reduce the influence or access to officeholders of special interests, reduce time pressures on candidates, or increase citizen or voter confidence in government." P.A. 256a (Winter, J. dissenting). The two-year time period, however, "will in the main favor incumbents, who face serious primary challengers less frequently than those seeking a party nomination to challenge an incumbent. Indeed, there appears to be little other reason justifying the choice of the two-year cycle." *Id.* at 248a.

The data compiled by both the State's and Plaintiffs' experts show that Vermont's limits will impose a greater burden upon most challengers. In Vermont, challengers routinely have outspent incumbents because they are more dependent upon spending for developing their reputations with the voters. Ex. VII, E-2352; Ex. III, E-987-92. Moreover, challengers rely on larger contributions than have incumbents, so that challengers in both the house and senate in 1998 would have lost a larger share of their funds than incumbents.

According to the State's expert Anthony Gierzynski, these limits would have banned 36% of the funds raised in 1998 senate races by all non-incumbents compared with 20.2% of the funds raised by all incumbents. Ex. III, E-0976. Similarly, in 1998 house races, the limits would have prohibited 24.6% of all non-incumbent funds compared with 19.7% of all incumbent funds. Ex. III, E-0978. Seventy-five house challengers (out of 150 seats) would have lost $44,680, while the 67 incumbents would have lost only $15,493. Ex. VII, E-2360. This understates the full extent of the problem because the data examined all candidates, not just the candidates in competitive races. Furthermore, this disparate impact on challengers is compounded because challenger spending is more effective than incumbent spending on a dollar for dollar basis. Tr. X-81; *see also* Tr. III-163.

Non-incumbent candidates, therefore, "are at an incredible disadvantage under the . . . statute[]." Tr. IV-172.[17] Thus, Act 64 is an effective means to protect incumbents.

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[17]This is especially true for nontraditional candidates, such as "a woman, an openly gay candidate, an African American candidate." Tr. IV-174. As an openly gay candidate himself, Steve Howard had the "added burden" of proving himself to voters. Tr. IV-175.

V. The Limits on Contributions to Candidates from Political Parties Are Too Low to Pass Heightened Scrutiny.

The District Court correctly recognized that even though limits on contributions from parties to candidates are permissible in order to "deter avoidance of the individual contribution limits," Vermont's contribution limits for political parties to candidates are too low. P.A. 72a-76a. The court explained that limits on party contributions "cannot be so radical in effect as to render political association between parties and candidates ineffective." *Id.* at 75a. The court found that the low limits "would reduce the voice of political parties to an undesirable, and constitutionally impermissible whisper." *Id.* at 76a. Furthermore, parties must "continue to function as they have in the past" in order to preserve the "stability and consistency of our competitive electoral process." *Id.* The Second Circuit reversed this decision, claiming no party evidence of lack of corruption, and rejecting the unique role of parties, and erroneously based its holding on this Court's decision in *Colorado II*. *Id.* at 176a-78a.

A. There is no evidence that political parties in Vermont act as conduits for contributions from donors to candidates.

In *Colorado II*, this Court considered a federal law imposing robust limits on a party's coordinated spending for a candidate. 533 U.S. 431; 2 U.S.C. § 441a(d)(3).[18] This

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[18] 2 U.S.C. § 441a(d)(3) allowed parties to spend in coordination with a Congressional candidate the greater of $20,000 (adjusted for inflation, § 441a(c)) or two cents multiplied by the voting age population. In 2000, the Senate limits ranged from $67,560 to $1,636,438; the House limits ranged from $33,780 to $67,560. *Colorado II*, 533 U.S. at 439 n.3. Vermont's limits of $200-$400 are much lower.

Court applied heightened scrutiny, inquiring whether the restriction was "closely drawn" to further a "sufficiently important government interest in combating political corruption." *Colorado II*, 533 U.S. at 456 (citations and quotation marks omitted).

This Court held that the *evidence demonstrated* "beyond serious doubt" that contribution limits to candidates would be eroded if coordinated spending were unlimited, *id.* at 457, since there was "substantial evidence" that candidates, contributors, and parties had tested the limits of the law. *Id.* Because political parties were found to be conduits for some contributors who sought to support a specific candidate through contributions to a party, *id.* at 451-52,[19] unlimited coordinated spending by a party could raise the risk of real or apparent corruption though circumvention of candidate contribution limits. *Id.* at 456.

In this case, however, the courts below found no evidence that candidate contribution limits are circumvented by donors that contribute to parties in order to benefit a specific candidate. There is no evidence of a tally system or of special clubs set up for large contributors.[20] But most importantly, the Vermont Republican

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[19]This Court based this conclusion on record evidence that the Democrat Party utilized a method known as "tallying," a system that "helps to connect donors to candidates through the accommodation of a party." *Colorado II*, 533 U.S. at 459. A former Democrat senator explained that "[d]onors would be told the money they contributed could be credited to any Senate candidate." *Id.* This Court also found that the Democratic Senatorial Campaign Committee had set up exclusive clubs for large contributors, who were invited to meet with Senators and candidates. *Id.* at 461 n.25.

[20]In addition, a political party in *Colorado II* could "spend money in support of a candidate without legal limit so long as it spends independently. A party may spend independently every cent it can raise wherever it thinks its candidate will shine, on every subject and

Party here does not seek to make unlimited contributions to its candidates, but only reasonable ones and the limits here are set too low. Because of the many differences between the two cases, the Second Circuit's reliance on *Colorado II* was misplaced.

B. Because of the differences between political parties and other contributors, political parties are entitled to robust contribution limits to their candidates.

The notion that a political party would seek to corrupt its own candidates is contrary to the consensus among political scientists that political parties and their candidates have uniquely shared interests, because (1) a party recruits and nominates its candidates and is his or her first and natural source of support and guidance, (2) a candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books, (3) a successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns, (4) a party's public image largely is defined by what candidates say and do, (5) a party's candidate is held accountable by voters for what his or her party says and does, and (6) a party succeeds or fails depending on whether its candidates succeed or fail. Individual and special interest contributors do not share comparable ties with a candidate.

Further, political parties have a different primary goal to achieve than other contributors – political parties contribute to their candidates in order to gain a majority, while others contribute to gain support for their public policy agenda. Left to their own devices, political parties

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any viewpoint." 533 U.S. at 455. In contrast, parties in Vermont cannot spend independently, without legal limit, due to the broad related expenditure provision.

tend to target their limited resources on challengers in competitive races. Non-ideological political action committees representing economic interests, however, tend to contribute to incumbents. Tr. X-149-51. The difference in contribution strategies is explained by their different motivation. Political parties pursue an "electoral" strategy, to gain or keep a governing majority, which is best achieved by supporting challengers (or vulnerable incumbents) in competitive races. Tr. X-149-50. Economic PACs, however, recognize that incumbency is the best predictor of election results, so contributing to incumbents helps maintain relationships with those most likely to affect the PAC's interests (and to avoid offending them by giving to challengers). Tr. X-149-50. Political scientists refer to this as a "legislative" strategy. Tr. X-149-50.

In fact, "targeting" by political parties is good for democracy, promotes more competition, helps challengers overcome the natural advantages of incumbency, equalizes competition, decreases the influence of the wealthy, and gives the voters more choice. Tr. VIII-139-41. Furthermore, "a larger role for parties in financing elections would result in more equitable distribution of campaign money and a greater level of competition in legislative campaigns." Anthony Gierzynski & David A. Breaux, *The Role of Parties in Legislative Campaign Financing,* 15 Am. Rev. Pol. 171, 171-89 (1994). Both the Plaintiffs' and the State's expert witnesses agreed that an expanded role for parties in the financing of candidate campaigns would be healthy for the electoral process and would actually remedy many of the perceived problems raised by proponents of Act 64. Tr. VIII-133-34, 143-44; Tr. X-150-52.

Vermont's new contribution limits, however, would severely weaken political parties. Tr. VIII-103. This "decline of party strength inevitably will enhance the influence of special interest groups whose only concern

all too often is how a political candidate votes on a single issue." *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting). Since there is no record evidence that contributors to political parties in Vermont are seeking to corrupt their candidates, the low contribution limits from political parties to candidates are not justified.

C. Further, the low party contribution limits to candidates would have a severe impact on political dialogue, preventing candidates from mounting effective campaigns, and, thus, do not survive heightened scrutiny.

Act 64's limits on contributions from parties to candidates will severely weaken the ability of candidates to raise the funds necessary for effective advocacy. The evidence establishes that many candidates will lose a large portion of their funds, which will prevent candidates from engaging in effective advocacy.

Plaintiffs' expert Clark Bensen analyzed several 1998 House races targeted by the Vermont Republican Party. Those targeted challengers would have been deprived of an average of $1,500 each in Republican Party contributions under the new limits or 30% of the funds they raised. Ex. VII, E-2602. Each of these candidates were challengers who won their races against incumbents. State expert Gierzynski also compiled a detailed report of the Republican Party's contributions in 1998 and concluded that the Republican Party had concentrated its resources on a few races and had given more than the new limits would allow. Tr. X-153-54.[21] The new contribu-

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[21]In 1998, the Republican Party contributed to 38 out of 126 candidates for the House. Ex. III, E-1012. Thirty of those contributions exceeded the $200 limit. Ex. III, E-1013.

tion limits, combined with the single source rule,[22] dramatically impact the Republican Party's ability to support its own candidates and will adversely impact candidates' campaigns.

In addition to losing direct monetary contributions, candidates will lose in-kind contributions of donor and voter lists, which are subject to the candidate contribution limits. Tr. I-167. This would have a particularly adverse impact, which concerned the District Court: "[P]olitical parties have traditionally done this . . . if you literally apply Act 64 to these lists . . . there's no way that a political party could ever share names of supporters with their candidates." Tr. IV-142-43. These lists are important to candidates so that they can communicate with voters and solicit contributions.

Parties also engage in other activities that are important to effective campaigning by candidates. During the 1998 election cycle, the Republican Party spent $200,000 to $300,000 on get-out-the-vote and absentee ballot programs which were often coordinated with particular candidates. Tr. I-194-95. Because of Act 64's "related expenditure" provision, these activities are treated as contributions and would have to be done by the candidates themselves or by the party completely independently, which would be less effective. Tr. I-168.

Candidates will lose substantial campaign funds under the limits on contributions from parties, restricting their ability to amass the necessary resources for effective advocacy. Therefore, the party contribution limits to candidates are too low to survive heightened scrutiny.

D. Furthermore, Vermont's low contribution limits from parties to their candidates undermine

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[22]All units of political parties are aggregated as a "single source" for purposes of the contribution limits.

the parties' ability to engage in effective advocacy, the purpose for such political association, which means that they are unconstitutional.

Because of the majoritarian goals of parties, "[c]ontributing money to candidates is a major means by which political parties define their existence." P.A. 47a. The purpose of parties is thus frustrated by the low contribution limits, which unconstitutionally preclude them "from effectively amplifying the voice of their adherents," *Shrink*, 528 U.S. at 387 (citing *Buckley*, 424 US. at 22), thereby thwarting the purpose of the association of "enabl[ing] like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22; *see also FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (level of scrutiny applied to "political financial restrictions" is "based on the importance of the political activity at issue to effective speech or political association").

1. Political parties are political associations formed to engage in effective advocacy.

Political parties play a constitutionally significant role in American political life:

> It is this ability and propensity of our citizenry to unite and pursue desired goals that form the foundation of American political thought. Indeed, the very existence of this nation stands as a testament to the efficacy of political organization.
>
> The bundle of freedoms bestowed by the first amendment, often perceived as safeguarding the individual from the will of the group, also serves to protect the group against the tyranny of the state. Having just emerged from an impassioned struggle for independence, the framers appreciated that effective political change could best be achieved through collective

> activities, and further recognized that the right to associate for political purposes was a natural concomitant of the right to espouse political views.

Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 267 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986); *see also Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989). Moreover, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). A political party's association with its own candidates enjoys heightened protection because a party's nominee "becomes the party's ambassador to the general electorate in winning it over to the party's views." *Id.* at 575.

2. Act 64's limits on political parties prevent them from engaging in effective political advocacy.

Plaintiffs' expert Professor Gerald Pomper is a founding member of the Committee for Party Renewal, which in 1984 adopted a manifesto entitled "Principles of Strong Party Organization," Ex. VII, E-2471-78, which can be used as a diagnostic tool to evaluate the effects of campaign finance restrictions on the effectiveness of political parties. Tr. VIII-104. The *Principles* are:

- Political parties should govern themselves.
- Political party organizations should be open and broadly based at the local level.
- Political parties should advance a public agenda.
- Political parties should be effective campaign organizations.

- Political parties should be a major financier of candidate campaigns.

Professor Pomper performed this evaluation and found that Act 64, "[i]n all but explicit language . . . essentially abolish[es] political parties from Vermont . . . and more fundamentally, the statutes subvert basic principles of democracy." Ex. VII, E-2463.

Under the Principle "Political parties should be a major financier of candidate campaigns," Pomper testified that parties "do a kind of triage." Tr. VIII-139. Parties give little to candidates who are sure to win or lose; instead, they "concentrate on the ones which are closely competitive." Tr. VIII-140. But the limits on contributions to candidates by parties, coupled with treating much traditional party voter registration and get-out-the-vote activity as in-kind contributions, "severely weakens the political parties in Vermont . . . [because] it severs any relationship . . . between the political parties and the candidates, and worsens the electoral process in the state." Tr. VIII-103. In sum, Pomper concluded that Act 64 violated each of the above Principles to the detriment of the political process in Vermont. Tr. VIII-104, 106-07, 119-20, 132-33, 140-41.

Furthermore, low contribution limits frustrate the electoral goals of political parties by making it more difficult for them to help challengers. State expert Gierzynski testified that when political parties are unfettered by low contribution limits they tend to focus their resources by giving large amounts to challengers in competitive races. *See* Ex. VIII, E-2748. Because of this, campaign finance laws ought to have higher contribution limits from political parties than from other contributors. Tr. X-151-52; Anthony Gierzynski & David A. Breaux, *The Role of Parties in Legislative Campaign Financing*, 15 Am. Rev. Pol. 171, 171-89 (1994); Anthony Gierzynski,

Money Rules: Financing Elections in America 121-22 (Westview Press 2000). The limits here do the opposite by preventing them from engaging in effective advocacy for their targeted candidates, ultimately frustrating the parties' electoral goals, the purpose of their association. As a result, Vermont's low contribution limits from parties to their candidates fail heightened scrutiny.

VI. Vermont's Mandatory Candidate Expenditure Limits Violate the First Amendment.

Act 64 imposes mandatory spending limits on candidates: $300,000 for governor, $100,000 for lieutenant governor, $45,000 for other statewide offices, $4,000 for state senator (plus an additional $2,500 for each additional seat in the same senate district), and $2,000 for a single member and $3,000 for a two member house district.[23] 17 V.S.A. § 2805a(a). However, no principle is more settled than that government-imposed expenditure limits on political speech, particularly by candidates, are repugnant to the First Amendment. *Buckley*, 424 U.S. at 58; *NCPAC*, 470 U.S. at 493-94; *Colorado I*, 518 U.S. at 614-16.

> A restriction in the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Buckley, 424 U.S. at 19.

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[23]Additionally, statewide incumbents are limited to 85 percent of the mandatory spending limits and incumbent senate and house members to 90 percent. 17 V.S.A. § 2805a(c). Amendments to Act 64, effective July 1, 2005, provide that the expenditure limits shall be adjusted for inflation. 17 V.S.A. § 2805a(e).

Under Vermont's campaign scheme, once candidates have spent their expenditure allowance, they are muzzled. At that point, they are unable to effectively respond to criticism from the press and groups that spend independently, who can do so without limit. Furthermore, candidates are even prohibited from driving their family car to a town square to speak once the limit has been met. Thus, candidates have no "alternative channels of communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989). Vermont has relegated candidates to bit players in their own elections.

A. There are no compelling interests sufficient to limit candidate expenditures.

"Regulations imposing severe burdens . . . must be narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Buckley* 424 U.S. at 44-45; *NCPAC*, 470 U.S. at 496. The Second Circuit held that an anti-corruption interest, when added to the interest in protecting the time of elected officials, was sufficient to uphold mandatory candidate expenditure limits. P.A. 145a. The majority remanded the case to the District Court to determine whether the limits were narrowly tailored to further those interests. *Id.* at 96a-97a. Judge Winter disagreed that the interests were compelling, explaining that each of the interests "has already been considered and rejected by the Supreme Court." P.A. 258a (Winter, J., dissenting) (citing *Buckley*, 424 U.S. at 44-45).[24]

1. Preventing the reality or appearance of corruption is not a compelling interest.

The anti-corruption rationale employed by the courts

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[24]Further, combining the two interests does nothing to make either compelling. "[A] synergy of nothing with nothing" is still nothing. P.A. 337a (Jacobs, J., dissenting).

below, however, has consistently been rejected as a justification for spending limits, *Buckley*, 424 U.S. at 45; *Colorado I*, 518 U.S at 618; *NCPAC*, 470 U.S. at 489; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-92 (1978), because there is no relationship between corruption and expenditures. "There is nothing invidious, improper, or unhealthy in permitting . . . funds to be spent to carry the candidate's message to the electorate." *Buckley*, 424 U.S. at 56.

The Second Circuit rationalized applying the anti-corruption interest by asserting that "*Buckley* was 'decided on a slender factual record,'" P.A. 117a, and that the factual record presented by the State could be sufficient to distinguish *Buckley*. *Id.* at 135a. However, the record in *Buckley* was far from "slender:" *Buckley*

> contained *over 700 pages* of statistical and testimonial data and findings of fact . . . includ[ing] data from opinion polls on public perceptions of politicians, political participation, expenditure limits, and cynicism about government, detailed catalogs of specific contributions by labor unions, PACs, and business organizations to individual candidates . . . and evidence that elected officials give preferential access to large contributors.

P.A. 259a-60a n.23 (Winter, J., dissenting) (citations omitted) (emphasis added). This Court had a full evidentiary record before it when it decided that the anti-corruption interest is not compelling and cannot support expenditure limits.

This is true even if the corruption interest is defined only as gaining "privileged access," which the court below thought was adequate. P.A. 101a. While the circuit court in *Buckley* noted that "[l]arge contributions are intended to, and do, gain access to the elected official," *Buckley v.*

Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975), this Court still held that the concern about "improper influence," 424 U.S. at 27, 45-46, a much stronger term, was insufficiently compelling to justify expenditure limits. *Id.* at 55. Having found something akin to "bribes" as insufficient, this Court "hardly had to go on to say that access or the appearance of access – returning or taking a phone call from a donor – was also not compelling." P.A. 259a (Winter, J., dissenting).

2. *Buckley* rejected the interest in protecting incumbents' time from the burden of fundraising.

The Second Circuit held that Vermont's interest in "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties," P.A. 135a, such as "independently studying legislative proposals or meeting with constituents," *Id.* at 142a, is compelling, when considered in tandem with the anti-corruption interest. *Id.* at 144a (quotation marks omitted).

The Second Circuit, seeking to minimize *Buckley*'s dismissal of this interest, maintained that this Court "alluded to this time-protection interest only in passing."*Id.* at 137a (citing *Buckley*, 424 U.S. at 91, 96). However, the interest in protecting candidates' time by alleviating the burden of fundraising was considered and rejected in *Buckley*. The time-protection rationale

> was relied upon by the Court of Appeals in *Buckley* in upholding the statute, was the subject of an entire subsection of the brief filed in the Supreme Court on behalf of the Attorney General and Solicitor General, was argued as a justification in the brief filed in the Supreme Court by intervening parties defending expenditure limits, and was mentioned by the Supreme Court itself.

P.A. 263a-65a (Winter, J., dissenting) (footnotes omitted). The time-protection interest "was, understandably, given only passing attention by the Court because it is not compelling in any sense." *Id.* at 273a; *see Buckley*, 424 U.S. at 55 ("No governmental interest that has been suggested is sufficient . . . .").

In regard to the allegedly related interest in ensuring that incumbents attend to their duties, Chief Judge Walker noted

> [T]he government has *no legitimate interest* in keeping incumbents in office at the expense of challengers. Where an officeholder complains that taking time to fundraise makes it harder to do the job and that the government has an interest in preventing this, the officeholder is saying in effect, "The government has an interest both in my doing my job and in getting me reelected by making campaigning (fundraising) easier." It has an interest in the former, but certainly not the latter. The decision to fundraise is the candidate's and, unless incumbent protection is a legitimate interest, not the business of the legislature.

P.A. 330a (Walker, C.J., dissenting) (emphasis in original); *see also Homans v. City of Albuquerque*, 366 F.3d 900, 919 (10th Cir. 2004) (Tymkovich, J., concurring, writing for the panel) ("Freeing politicians from having to make th[e] choice [between doing their official duties and fundraising] is not a compelling governmental interest.").

Furthermore, the record is practically void of evidence of specific amounts of time spent fundraising by incumbents or the amount of time which this takes from official duties. "To the extent that a particular amount of time was described, it was brief, such as an afternoon. Trial Tr. vol. IX at 151 (Elizabeth Ready) ('That afternoon that I had to raise that extra money, I wasn't in front of the Grand Union nor was I going door to door.')." P.A. 274a

(Winter, J., dissenting).[25]

3. There are no compelling interests that justify limiting candidates in spending their own money on their campaigns.

This Court in *Buckley* struck down a ceiling on personal expenditures by candidates for their own campaigns, because it "imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression," and because "prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds." 424 U.S. at 52-53.

Because Vermont's expenditure limits apply to a candidate's own funds, the asserted interests here are not applicable even if valid in other circumstances. A candidate cannot sell access to himself and he is not burdened with fundraising when he spends his own money. As a result, the expenditure limits are unconstitutional.

B. The expenditure limits are unconstitutionally low.

Even if candidate spending limits are somehow consistent with the First Amendment, the limits here are too low, because they will prevent candidates from

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[25]Finally, Vermont has enacted "circular, self-justifying" legislation by adopting "laughably low" contribution limits which "require candidates to spend more time fundraising than would higher limits. In other words, the Vermont law's contribution limits increase demands on candidates' time, and the expenditure limits are then justified on the basis of time pressures that the law itself has intensified," P.A. 330-31a (Walker, C.J., dissenting). The Second Circuit essentially acknowledged this. P.A. 150a. If this interest were bona fide, Vermont could simply raise the contribution limits. P.A. 336a (Jacobs, J., dissenting) (rejecting the argument that "*more-restrictive* expenditure limits" are justified "to mitigate the inevitable and predictable side-effect of the *less-restrictive* contribution limits").

"amassing the resources necessary for effective advocacy." *Id.* at 21 (discussing contribution limits). The extensive record compiled in this case demonstrates that, far from being narrowly tailored to any of the State's asserted interests, these limits "are so laughably low that they cannot but impede meaningful debate of public issues," P.A. 344a (Cabranes, J., dissenting), and "are so low that they are unconstitutional by any reasonable test." P.A. 255a (Winter, J., dissenting).

1. Vermont's expenditure limits reduce candidates' historic efforts to communicate with voters.

Act 64's expenditure limits are set considerably lower than those in *Buckley* and would have a far more dramatic impact on spending. In *Buckley*, the spending limits had been exceeded by 17 of 66 (26%) major party Senate candidates and by 22 of 810 (3%) major party House candidates in the immediately preceding election. 424 U.S. at 20 n.21. In contrast, Vermont's spending limits were exceeded by 57% of all senate campaigns and 30% of all house campaigns that filed reports in 1998, and 27% of such senate campaigns and 10% of house campaigns spent more than double the new limits. Ex. VII, E-2351. In statewide races, the State's expert reported that the spending limits were exceeded by 12 of the 29 (41%) major party contenders for statewide office between 1994 and 1998. Ex. III, E-0961. These numbers underestimate the true percentages because they include non-competitive races and do not include related expenditures.[26]

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[26] As Chief Justice Walker pointed out in his rehearing dissent: "Because Act 64 defines candidate expenditures to capture related expenditures by supporters, just to keep spending under the new law at historical levels would require setting expenditure limits *above* those historical levels." P.A. 332a (citation omitted) (emphasis in original).

Moreover, the focus should be on competitive races, where the impact would be severe. Of the 14 Senate candidates targeted by the Republican party in 1998 as the most competitive, 12 spent more than the new limits, and five spent more than double. Tr. I-196; Ex. VII, E-2354-58. Of the 17 House candidates targeted by Republican Party, 16 spent more than the new limits would allow, 9 of these spent more than double, and 4 of them spent more than triple. Tr. I-197; Ex. VII, E-2362-75.[27]

2. Vermont's expenditure limits will prevent effective candidate campaigns.

Vermont's expenditure limits prevent effective campaigns. The trial evidence demonstrated that Vermont's limits on spending in statewide races is far too low to allow most candidates to mount effective campaigns. Detailed testimony was provided by Kathy Summers, who was campaign manager for Ruth Dwyer's campaign for governor to unseat long time incumbent Howard Dean. To run an effective campaign, Dwyer would need "between 600 and $800,000." Tr. IV-81. If the campaign was limited to less than half this sum, severe cuts would have to be made. Each of the principal components of an effective campaign, direct mail, media, an effective grass roots organization, and a get-out-the-vote drive, Tr. IV-80-81, would be severely hampered.

Although direct mail is the most effective way to draw small-dollar contributions in Vermont, it is too expensive to use under the low spending limits and would have been abandoned. Tr. IV-82-83. The Dwyer campaign's

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[27]The level of spending after the trial also surpassed the expenditure limits. The major party candidates in the last two gubernatorial elections in Vermont spent two or three times more than the limits. P.A. 239a (Winter, J., dissenting). All three candidates in the last race for Lieutenant Governor exceeded the limits by 38% - 63%. *Id.*

town meeting tour would be undermined since effective town meetings require a preceding and follow-up town-wide mailing. Tr. IV-90-91. When the campaign used such mailings, they drew 80-100 people, but without them attendance dropped to 30-40 people. Tr. IV-107-08.

Dwyer's grass roots efforts would have been eviscerated because she could not hire sufficient staff to coordinate volunteer efforts or be able to do prospective direct mail to identify potential volunteers. Tr. IV-92-94. The limits would thereby "take[] away two of the most important mechanisms that I have to be able to build a grass roots network." Tr. IV-94. Moreover, the Dwyer campaign's get-out-the-vote efforts would have been cut by 70%, Tr. IV-97-98, and its media budget cut in half. Tr. IV-95-96.[28]

The Second Circuit, however, rejected Plaintiffs' claim that much higher amounts than allowed by the expenditure limits were necessary to wage effective campaigns, P.A. 154a-55a, because the District Court found that average spending in the last three election cycles was at or below the expenditure limits. P.A. 42a-43a.[29]

Past average spending fails to account for future elections that involve controversial issues, where public

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[28]William Meub, Dwyer's Republican primary opponent, also testified that under the expenditure limits "we are going to be limited in this campaign to only being able to run three ads," which was half as many as one Vermont U.S. Senator had recently spent against "a straw candidate." Tr. IV-29-30.

[29]The District Court's review of past campaigns was too limited. For instance, in 1988, spending on the gubernatorial campaign exceeded one million dollars. Ex. VII, E-2397. From 1980 to 1998, the average spending on the seven races for U.S. Senate was $1.418 million for the top two vote-getters; for the U.S. House it was $647,000. Ex. VII, E-2397. All these were statewide races, where candidates attempt to run effective campaigns.

interest is high, and where the direction of the state could be decided. For example, more money was spent in the 2000 election than in any prior Vermont election, because civil unions, same-sex marriage, and other controversial issues were at stake. P.A. 238a (Winter, J., dissenting). In addition, the related expenditure provision was not a part of Vermont law before Act 64 and, therefore, was not accounted for in calculating past spending. *Id.* at 234a. As a result, the past spending averages grossly underestimate the amount candidates would actually "spend" in the future.[30]

For an unknown challenger to run an effective campaign, it would cost $4,000 to $6,000 in the house, $30,000 to $50,000 in the senate, and $600,000 to $800,000 for governor. *See supra* note 12. The expenditure limits here are woefully inadequate.[31]

C. Vermont's spending limits disproportionately harm challengers.

Just as too low contribution limits benefit incumbents, *Shrink*, 528 U.S. at 404 (Breyer, J., concurring), too low expenditure limits could "insulate [incumbents] from effective electoral challenge." *Id.* at 402. As set forth extensively above, the meager expenditure limits do not allow challengers to overcome incumbents' advantages.

This should not be surprising since the justifications for Act 64 all center around incumbent protection. The

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[30]Past spending averages also do not include the costs of compliance with the new, complicated Act. P.A. 235a (Winter, J., dissenting). The burdensome related expenditure provision could very well necessitate the hiring of additional staff to monitor related expenditures. *See id.* at 226a; *see also id.* at 231a.

[31]Candidate expenditures in the two statewide elections since the enactment of Act 64 have far exceeded Act 64's expenditure limits. P.A. 239a-40a (Winter, J., dissenting).

time-protection "interest" "is less about increasing person-to-person contact with voters than it is about limiting their opponents' overall contact with voters." P.A. 275a (Winter, J., dissenting). Further, measuring "effective campaigns" by whether a campaign achieves only a "level of notice" ensures that "an incumbent's campaign starts at the 'level of notice' at which a challenger's campaign may be stopped by government." *Id.* at 285a. And the dreaded "arms race," which the State seeks to stop at all costs, refers, in reality, "to contested elections in which challengers spend resources to run serious campaigns." *Id.* at 247a.

Vermont provides that incumbents can spend only 85%-90% of the limits. 17 V.S.A. § 2805a(c). William Meub described this as a "farce," since the "incumbency handicap" should be 50%. Tr. IV-31. There is no evidence in the record that this "fig leaf" is "sufficient to overcome the numerous and powerful advantages of incumbency." P.A. 339a n.6 (Jacobs, J., dissenting).[32]

D. There are less restrictive alternatives.

The limits are not narrowly tailored because there are less restrictive means to prevent the reality and appearance of corruption. "The interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." *Buckley*, 424 U.S. at 55. Further, there are less restrictive means of protecting candidates' time. Contribution limits could be raised so that candidates can raise more money from their existing donors, the State could provide

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[32]Exacerbating the harm to challengers, the limits apply over a two-year period. This means that candidates must divide their expenditure amounts between primary and general elections. Because incumbents face primary challengers less often than non-incumbents, they will generally have more money left for the general election.

additional staff to allow officeholder candidates to attend to their official duties more efficiently, and Vermont could provide for public financing with spending caps for those that elect to receive public funds. Unlike campaign spending limits, none of these alternative remedies would harm First Amendment rights, and they have been approved by this Court.

VII. Vermont's Presumption of Coordination Provision Is Unconstitutional.

Act 64 includes a presumption that an expenditure made by a political party or political committee that benefits six or fewer candidates is a "related expenditure," subject to candidate contribution and expenditure limits. 17 V.S.A. § 2809(d). The Second Circuit, in a cursory, three-paragraph discussion, upheld the presumption, as it related to the contribution limits,[33] because it is rebuttable rather than conclusive. P.A. 183a-84a. The court summarily announced that "[t]he Constitution does not bar the use of rebuttable presumptions in this context." *Id.* at 183a.

The Second Circuit, however, failed to recognize the unconstitutional burden that this "rebuttable" presumption imposes on First Amendment rights. While the court conceded that "an accused party" can be forced into a court proceeding, *Id.* at 184a; *see* 17 V.S.A. § 2809(a), (e), it diminished this heavy burden[34] by stating that "there are ample strategies that an accused party can employ to demonstrate that an expenditure was truly independent." P.A. 184a. However, such rebuttable presumptions

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[33]The court, however, remanded consideration of the related expenditure provision as it relates to "expenditures." P.A. 189a.

[34]It is well established that subjecting First Amendment freedoms to investigation itself can unconstitutionally burden these freedoms. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

require private parties to "bear the costs of litigation and the risk of a mistaken adverse finding," which "must necessarily chill speech in direct contravention of the First Amendment[]." *Riley v. National Federation of the Blind*, 487 U.S. 781, 794 (1988). Moreover, the presumption unfairly places on the candidate and the political organization the burden of proof to prove a negative – that coordination did not take place. [35]

But ultimately the greatest burden is that it converts constitutionally protected independent speech to speech subject to contribution and expenditure limits by failing to require actual "prearrange[ment] or coordinat[ion] . . . with the candidate or his agent." *Buckley*, 424 U.S. at 47. Only expenditures that are "controlled by or coordinated with" a candidate may be treated as contributions. *McConnell*, 540 U.S. at 219. This Court has "repeatedly . . . struck down limitations on expenditures 'made totally independently of the candidate and his campaign,'" *Id.* at 221 (quoting *Buckley*, 424 U.S. at 47).

The First Amendment places the burden of persuasion on the government to show that the speech is protected. *Francis v. Franklin*, 471 U.S. 307 (1985). Thus, a mandatory presumption, even a rebuttable one as here, *see id.* at 317, imposes an unconstitutional burden on speech if it shifts the burdens of proof or persuasion from the government to the speaker to prove that the speech is protected. *Speiser v. Randall*, 357 U.S. 513, 526-28 (1958). Furthermore, the "connection between the two facts" must be "accurate in the run of cases." *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979).

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[35] Furthermore, the candidate and the political organization face steep civil penalties, if the expenditure is found to be related and it surpasses the applicable contribution and/or expenditure limits, of up to $10,000 for each violation. 17 V.S.A. § 2806(b).

This is not true here since "prearrangement or coordination" has nothing to do with the fact that the ad mentions six or fewer candidates.

In *Colorado I*, this Court struck down a presumption that all party spending is coordinated, holding that "*convincing evidence* [that] . . . a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system" is required. *Colorado I*, 518 U.S. at 617-18 (emphasis added). Coordination of expenditures requires factual evidence of coordination, and "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22. Since Act 64's presumption does not require the government to prove that "related" expenditures are actually prearranged, coordinated with, or controlled by a candidate, the presumption unconstitutionally sweeps in independent expenditures, "significantly impair[ing] the ability . . . to engage in direct political advocacy and 'represent[ing] . . . substantial . . . restraints on the quantity and diversity of political speech.'" *Id.* at 615 (citations omitted).

VIII. The State's Arguments Would Justify a Government Ban on Privately Funded Campaigns.

"The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790-91. Vermont seeks to reverse this presumption by imposing draconian restrictions on the speech of candidates, which it justifies by "broadly defined" interests in corruption and incumbent time-protection. If accepted by this Court, Vermont will have justified more than its "laughably low" contribution and expenditure limits. It will have justified abolishing privately funded campaigns.

First, the State seeks to justify limiting all contributions, not just those that are large enough to give rise to a perception of corruption. Application of the anti-corruption interest to all contributions "extend[s] *Buckley* to the infinitely broader interest of limiting all, not just large, campaign contributions." *Carver*, 72 F.3d at 639. This result would effectively remove candidate contributions from the protection of the First Amendment and provide a justification to abolish all private funding of campaigns.

Second, the State broadly defines "corruption" to include "special access or the appearance of special access of donors to officeholders," the influence of "bundled" contributions, and decreasing "citizen confidence in the electoral process." P.A. 255a (Winter, J., dissentig); P.A. 128a-35a. There are two types of "special access" identified by the Second Circuit, "the fundraising system," P.A. 101a, and "officials . . . more likely to return donors' phone calls." *Id.* at 140a. A key fundraising method is "selling access," for example, fundraising events where candidates or public officials appear and the attendees pay to attend. If fundraising receptions or dinners are inherently corrupt, then a key element of fundraising for all campaigns can be abolished. Further, it is only human nature to be grateful to one's supporters, whatever the nature of that support, and to return their phone calls. If natural human gratitude is now corruption, then certainly corruption will infect all of politics and private funding of campaigns can be abolished, and maybe even elections themselves.

"Bundling" is where "special interests" provide financial support "by way of 'bundling' smaller contributions from a particular company or industry." *Id.* at 133a. While the Second Circuit acknowledged that *Buckley* seemed to dismiss this concern in footnote 64, *id.*, (citing *Buckley*, 424 U.S. at 56 n.64) ("If a senatorial candidate

can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communications?") (internal quotation marks omitted)), this Court went further than that, in upholding the FECA's contribution limit, by emphasizing, rather than bemoaning, the fact that "persons [remained] free" to "assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources," *Buckley*, 424 U.S. at 28, and citing the fact that "the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents." *Id.* at 28 n.31. But if multiple lawful contributions from people with a shared interest is corruption, then nothing short of abolishing private funding of campaigns will stop it.

"Citizens' confidence in the electoral process" is certainly desirable, but it is defined broadly here as "Vermonters . . . troubled by how money influences campaigns," P.A. 56a, "voters . . . extremely concerned about the influence of special interest in the political process," P.A. 130a, and "94 percent of Vermonters believe that too much money is spent in politics, and 76 percent believe that ending private contributions would 'reduce the power of special interests.'" *Id.*. This is simply a description of the healthy scepticism that the American people have about politics and politicians and, if credited with the power to uphold the limits here, would justify abolition of private funding of campaigns generally.[36]

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[36]If this description of corruption were extended to the "perception of corruption" and is credited, even without factual support, it would have no bounds. A subjective perception of corruption that has no basis in fact cannot be refuted. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1067 n.113 (1996). Furthermore, it is a "quintessential self-fulfilling prophesy." P.A. 277a (Winter, J., dissenting).

Third is the concern of the Second Circuit that "candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests" and are concerned "about the reaction of contributors." *Id.* at 131a. Of course, in a representative democracy, politicians will be concerned about the reaction of people generally, and of their supporters, or potential supporters, particularly, to their actions in office. It would be both silly and dangerous to define corruption this way.

> If it were reasonable to presume corruption from the fact that a public official voted in a way that pleased his contributors, legislators could constitutionally ban all contributions except those from the public official's opponents, a patent absurdity. That would spell the end to the political right, protected by the First Amendment, to support a candidate of one's choice.

Russell v. Burris, 146 F.3d 563, 569 (8th Cir. 1998); *see also McCormick v. U.S.*, 500 U.S. 257 (1991) (reversing legislator's Hobbes Act conviction for soliciting a campaign contribution and then introducing legislation favorable to the contributor).

Finally, if the desire for campaign cash to fund an "arms race" can justify both 'laughably low" contribution and expenditure limits, it is sufficient to ban all privately funded campaigns,[37] and the reversal of the presumption

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"The confidence of Vermont citizens in their state government is unlikely to be substantially enhanced so long as Act 64's proponents make unsupported claims about the corrupt nature of that government." *Id.* 277a.

[37]The breadth of these arguments and their effect on private funding of campaigns should not be surprising, since one of the prime supporters of Act 64, and counsel for the Respondent-Intervenors, is the National Voting Rights Institute, which considers "Getting money out of politics [to be] the unfinished business of the Voting Rights

of the First Amendment would be accomplished. The government will have taken away the core of the First Amendment, leaving only its periphery.

Conclusion

This Court should remand with direction to award judgment to Plaintiffs with respect to 17 V.S.A. §§ 2805(a), 2805a, 2809(d) and for further proceedings consistent with this Court's decision.

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Movement." http://www.nvri.org/about/wealth.shtml (last visited Dec. 2, 2005). This organization has brought several lawsuits to have privately funded campaigns declared unconstitutional. *See, e.g., Albanese v. FEC*, 78 F.3d 66 (2d Cir. 1996); *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999).

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In the
SUPREME COURT OF THE UNITED STATES

NEIL RANDALL, *ET AL.*,
AND
VERMONT REPUBLICAN STATE COMMITTEE, *ET AL.*,
Petitioners / Cross-Petition Respondents,

v.

WILLIAM H. SORRELL, *ET AL.*,
Respondents / Cross-Petitioners,
AND
VERMONT PUBLIC INTEREST RESEARCH GROUP, *ET AL.*,
Respondent-Intervenors / Cross-Petitioners.

On Writ Of *Certiorari* To The
United States Court Of Appeals
For The Second Circuit

Brief Of Respondents/Cross-Petitioners William H. Sorrell, *Et Al.*

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the dollar amounts of Vermont's limits on campaign contributions to candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party that primarily benefits six or fewer candidates is presumed to be a coordinated expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch, and Libertarian Party of Vermont: *Petitioners in 04-1528 and Cross-Petition Respondents in No. 04-1697*;

Vermont Republican State Committee; Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures; Marcella Landell; and Donald R. Brunelle: *Petitioners in No. 04-1530 and Cross-Petition Respondents in No. 04-1697*;

William H. Sorrell; John T. Quinn; William Wright; Robert Butterfield; Robert Simpson, Jr.; Vincent Illuzzi; James Hughes; David Miller; Joel W. Page; William Porter; Keith W. Flynn; James P. Mongeon; Craig Nolan; Dan Davis; Robert L. Sand; and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in No. 04-1697*;[1]

Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Rural Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; Mike Fiorillo; Marion Grey (deceased); Phil Hoff; Frank Huard; Karen Kitzmiller (deceased); Daryl Pillsbury; Marion Milne; Elizabeth Ready; Nancy Rice; Cheryl Rivers; and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 & 04-1530 and Cross-Petitioners in No. 04-1697.*

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, State's Attorneys Dale Gray, Lauren Bowerman, George Rice, James McNight and Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

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JURISDICTION OVER CROSS-PETITION

The Petition for a Writ of *Certiorari* in No. 04-1528 was placed on this Court's docket on May 16, 2005. Pursuant to Rule 12.5, the Conditional Cross-Petition of William H. Sorrell, *et al.* (the "State") and Vermont Public Interest Research Group, Inc. ("VPIRG"), *et al.*, No. 04-1697, was timely filed by transmitting it to the Clerk of the Court on June 14, 2005. Jurisdiction lies under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. Act 64

A. The Vermont Legislature passed Act 64 in 1997 after an extraordinary series of hearings on the influence of money in politics. The 65 hearings, at which 145 witnesses testified, unequivocally demonstrated that, despite existing contribution limits and disclosure laws, Vermonters' faith in the integrity of government and in their elected officials was being profoundly shaken by the effects of large contributions and unfettered campaign spending. Randall Petitioners' Appendix ("P.A.") 31a-32a.

The Legislature made detailed Findings that set forth Act 64's purposes and the conclusions that body drew from the record before it. The Findings specify how large campaign contributions and unrestrained campaign expenditures reduce public confidence in government, pressure officials to give access and respond to large contributors in preference to those who can afford to give little or nothing, increase the appearance that officials are unduly influenced by monied interests at the expense of the best interests of Vermont citizens, marginalize regular citizens from the political process, force officials to divert their time and energies from their duties to limitless fundraising, decrease robust debate of issues and candidate interaction with the public, and financially prevent many Vermonters from seeking public office. Joint Appendix ("J.A.") 20-23.

The Legislature concluded that a carefully drawn law containing both expenditure limits and contribution limits would work directly to remedy all of the above ills; would restore integrity to the electoral process; would permit healthy, vibrant and effective campaigns; and would ensure the Vermont Constitution's directive that "'all elections ought to be free and without corruption.'" P.A. 35a (quoting Vt. Const. ch. I, art. 8).

B. Significant testimonial and documentary evidence gave full support to the Findings. Even with Vermont's prior contribution limits, the record showed how the need for unlimited cash allowed contributors and groups of contributors to obtain preferential access and exert undue influence over officials. Governor Howard Dean confessed that: "money does buy access, and we're kidding ourselves and Vermonters if we deny it." P.A. 93a-94a; *see* Exs.[2] I:92; II:732 (access and attention are commodities). The President of the Senate, Peter Shumlin, admitted that his decisions are sometimes made "based upon that whole lot of money I raised." Ex. I:291; *see* Exs. I:205 (money "plays a role in decisions"); III:795-97 (former Treasurer bowed out of re-election race after awarding no-bid contracts to firms that had contributed to his campaign); II:425-26 (influence of monied interests helped defeat bottle bill); I:217 (contributions given to obtain influence); II:503 (same); II:492 ("money buys influence"); I:349 (officials "more accountable" to contributors); II:428 (money controls candidates); I:369-70 (concern over "purchase of influence"); I:217 (unsolicited corporate donations were made to influence); I:405-06 (lobbyists can influence officials' decisions based on past giving and future need).

The Legislature heard that parties and candidates, too, exploit such a system by seeking funds from those who regularly come before them. Exs. II:511 (aggressive targeting

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[2] Ex. __ and Tr. __ refer to the pages of the binders of trial exhibits and transcripts that comprised the record in the court of appeals.